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CLERK'S COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 786

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

VS.

FRANK PEEL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 8495

FRED G. ZERBST, WARDEN,
UNITED STATES PENITEN-
TIARY, ATLANTA, GEOR-
GIA, RESPONDENT,

Appellant, No. 1215

versus

FRANK PEEL, PETI-
TIONER,

Appellee.

HABEAS CORPUS

Appeal from the District Court of the United States
for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,

United States Attorney, Atlanta, Ga.

HARVEY H. TYSINGER, ESQ.,

Assistant United States Attorney, Atlanta, Ga.

H. T. NICHOLS, ESQ.,

Assistant United States Attorney, Atlanta, Ga.

Attorneys for Appellant

CLINT W. HAGER, ESQ.,

621 Atlanta National Bank Bldg., Atlanta, Ga.,

Attorney for Appellee.

PETITION FOR WRIT OF HABEAS CORPUS

Comes now your petitioner, Frank Peel, and presents this his petition for the Writ of Habeas Corpus and shows this Honorable Court the following facts:

That he is now detained and imprisoned in the United States Penitentiary, Atlanta, Georgia in the custody of Fred G. Zerbst, Warden of said Penitentiary by color of authority of the United States and within the jurisdiction of the United States District Court for the Northern District of Georgia.

That at the October term, 1935 held at Covington, Kentucky, for the Eastern District of Kentucky, an indictment was returned against your petitioner consisting of two counts, both alleging a violation of Title 26, Sections 281 and 306.

That after entering a plea of guilty to said indictment your petitioner, on October 24th 1935, was sentenced to be committed to the custody of the Attorney General or his authorized representative for confinement in an institution of the Penitentiary type for a period of two years and to pay a fine of one hundred dollars.

Your petitioner would now show this Honorable Court by reason of deduction allowed under authority of Title 18, Section 710 for good conduct, his sentence expired June 1st, 1937 and that he is now detained and imprisoned illegally and unlawfully, in the custody of Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, by virtue of a purported parole warrant issued by the United States Board of Parole,

Washington, D. C., alleging a violation of your petitioners parole which he had been given on a previous sentence.

It is contended by your petitioner in the absence of specific instructions to the contrary, that the unserved portion of his parole period runs concurrently with the two year sentence imposed upon him October 24th, 1935.

A certified copy of the indictment, judgment, of the Court and commitment, covering the sentence of two years, which your petitioner has completed, are attached hereto and respectfully requested to be made a part and parcel of this petition.

Your petitioner, is unable to furnish this Honorable Court with a copy of the purported parole warrant, therefore he respectfully requests that a copy of same be furnished this Court by the respondents.

Your petitioner contends the case at bar comes clearly within the ruling of *Aderhold v. M. McCarthy* 65 F. (2d) 791 in which case the Circuit Court of Appeals, for the Fifth Circuit, held that the serving of a warrant was immaterial, when the prisoner was already in custody. In view of this ruling and particularly the absence from the judgment of any specific instructions as to what sequence the sentence and remaining portion of the parole are to be served.

Your petitioner contends the remaining portion of his parole began to toll with the imposition of the two years sentence on October 24th, 1935.

And to further detain and imprison your petitioner

would be depriving him of his constitutional rights. Wherefore your petitioner prays that the writ of Habeas Corpus issue directed to Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, to bring and have your petitioner before this Honorable Court at a time so directed by this Court, together with the true cause of his restraint and detention so that this Court may proceed in a summary way to determine the legality of his detention and dispose of your petitioner as the law and justice may demand, and your petitioner will ever pray, and etc.

FRANK PEEL, *Petitioner.*

STATE OF GEORGIA
COUNTY OF FULTON

AFFIDAVIT

Your petitioner Frank Peel first being duly sworn deposes and says that he has read the foregoing petition, that all the allegations contained therein are true, except those that stated upon information and these he believes to be true and that he is entitled to the redress sought therein.

FRANK PEEL,

Affiant.

Sworn and subscribed to before me this 1st day of June 1937.

ERNEST D. ETHERIDGE,
Notary Public, State of Georgia.
(NOTARIAL SEAL)

AFFIDAVIT IN FORMA PAUPERIS

Comes now your petitioner, Frank Peel, who is a citizen of the United States of America or was a citizen before alleged charge of crime, of legal age, and who is now detained and imprisoned in the United States Penitentiary, Atlanta, Georgia, and within the jurisdiction of the United States District Court for the Northern District of Georgia, that he wishes to bring an action to test the legality of his imprisonment, but because of his poverty, he is unable to pay the costs or give bond in lieu thereof.

Wherefore, your petitioner, respectfully requests that he be permitted to prosecute said action in forma pauperis.

FRANK PEEL,
Affiant.

Sworn and subscribed to before me this 1st day of June, 1937.

ERNEST D. ETHERIDGE,
Notary Public, State of Georgia.

(NOTARIAL SEAL)

ORDER GRANTING WRIT IN FORMA PAUPERIS

• Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me at Atlanta,

Georgia, at 10:00 o'clock a. m. on the 5th day of June, 1937.

This the 3rd day of June, 1937.

E. MARVIN UNDERWOOD,

U. S. Judge.

NOTE:

Exhibits omitted.

Filed in Clerk's Office, United States District Court,
Northern District of Georgia, June 3rd, 1937.

J. D. STEWARD, *Clerk,*

By W. L. NEESE, *Deputy Clerk.*

ANSWER

Now comes the respondent in the above-entitled proceeding, and, in obedience to the *writ of habeas corpus*, produces the body of the petitioner at the time and place directed therein; and, pursuant to Section 457 of Title 28 of the United States Code, does hereby certify that for cause of detention he holds petitioner under and by virtue of warrant of commitment issued by the United States District Court for the Eastern District of Kentucky. Also attached hereto and made a part hereof is a copy, marked "Exhibit A", of petitioner's conduct record sheet of file in the Atlanta Federal Penitentiary, showing respondent's computation of pe-

tioner's period of servitude. Respondent further says that the facts are, as follows:

Respondent holds in his possession two warrants of commitment for the incarceration of petitioner, both having been issued by the U. S. District Court for the Eastern District of Kentucky, and each commanding imprisonment for a term of two years. Petitioner was first committed to the institution under the mittimus referred to above. While serving this sentence, he was on April 18, 1935, released on parole. On Nov. 8, 1935, he was returned to the institution with a new sentence of two years as evidenced by warrant of commitment, copy of which, marked "Exhibit B," is annexed hereto and by reference incorporated in this return.

Afterwards petitioner was declared a parole violator, and warrant of the Parole Board issued for his retaking, dated, Nov. 21, 1935, a copy of which, marked "Exhibit C," is hereto annexed and by reference made a part of this return. In letter dated Jan. 4, 1936, signed by Ray L. Huff, Parole Executive, transmitting this warrant, respondent was directed that the warrant be placed as a detainer, and that petitioner be taken into custody on it at the expiration of the second sentence of two years. The letter further instructed that the case should be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant. These instructions have been strictly complied with.

On June 1, 1937, the second sentence of two years expired, and petitioner was served with the aforesaid

parole warrant, and is now held under it to await the action of the next meeting of the board of Parole.

Respondent does not attempt to controvert the fact that both warrants of commitment are silent as to sequence of service, but it must be conceded upon the face of the record that there are no directions in either mittimus as to concurrent or consecutive service. Respondent merely asserts that, the parole warrant having never been executed, and the Parole Board having never heard petitioner's case on the question of revocation of parole, and the parole warrant having been retained throughout this period as a detainer, the unexpired portion of petitioner's first sentence still remains unsatisfied, and the Parole Board is not without jurisdiction to restrain petitioner under the aforesaid parole warrant, and to revoke his parole at the next meeting of the board, or take such other action as it sees fit.

Wherefore, having fully answered, respondent prays the judgment of the court in the premises.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney.

Counsel for Respondent

STATE OF GEORGIA)
FULTON COUNTY)

Personally before me, the undersigned officer duly authorized to administer oaths, appeared B. F. Bates, who on oath deposes and says that he is Record Clerk of the United States Penitentiary at Atlanta, Ga., that he has read the contents of the foregoing return, and that the statements therein averred are true, accurate and correct according to his best knowledge and belief and according to the records of said penitentiary. Deponent further says that if the contentions of petitioner be taken as true, and his two sentences of imprisonment be construed as running concurrently, then the writ of habeas corpus is not premature, but that petitioner's term of servitude would expire on June 1, 1937.

B. F. BATES.

Subscribed and sworn to before me,
this 5th day of June, 1937.

HARRY MOSES,

Notary Public, Georgia, State at Large.

**EXHIBIT "A" — CONDUCT RECORD
UNITED STATES PENITENTIARY
ATLANTA, GEORGIA :**

Record of Frank Peel, Color White, No. 47063. Crime Illicit Distilling. Sentence, 2 years. Fine \$100.00 Costs. Not Committed. Received 11-8-35. Where convicted,

E-Ky-Covington. Sentenced 10-24-35. Occupation, Auto Mechanic. Age 29. Sentence commences 10-24-35. Full term expires 10-23-37. Good time allowance, 144 days. Short term expires 6-1-37. Residence, Florence, Ky. Action of Parole Board—6-22-36 Did not file Eligible for parole 6-23-36. WANTED to be held at expiration of instant sentence for service of remainder of sentence as No. 2379, as parole violator from FRC, Petersburg, Va. 2-22-36 — Corrected commitment received showing fine and costs not committed.

COMMITMENT

DISTRICT COURT OF THE UNITED STATES EASTERN DISTRICT OF KENTUCKY

THE PRESIDENT OF THE UNITED STATES OF AMERICA

*To the Marshal of the United States for the Eastern
District of Kentucky—GREETING:*

WHEREAS, at the October term of said Court, 1935, held at Covington, Kentucky, in the said district, to wit, on October 24, 1935, Frank Peel was sentenced by said Court, upon his Plea of Guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for confinement in an institution of the Reformatory or Penitentiary type, for and during the term or period of Two Years beginning October 24, 1935 and to pay a fine to the United States in the sum of \$100.00 and costs for having carried on the business of a distiller with intent to de-

fraud the United States, and having in possession an unregistered still in violation of Title 26, Sections 306 and 281 U. S. C. A.

NOW, THIS IS TO COMMAND YOU, THE SAID MARSHAL, to take the body of the said Frank Peel and commit the same pursuant to the above sentence.

WITNESS, The HONORABLE H. CHURCH FORD, Judge of the District Court of the United States for the Eastern District of Kentucky, this 24 day of October, A. D. 1935.

A. B. ROUSE,
Clerk

By Florence Dunham,
Deputy Clerk.

This commitment received Feb. 22, 1936—Atlanta, Georgia.

RETURN

I have executed the within writ in the manner following, to wit: On October 24, 1935, I delivered the said Frank Peel to the Jailor of the Newport City Jail temporarily, pending transfer to the institution designated for the service of sentence, and on November 8, 1935 I delivered said Frank Peel to the Warden of U. S. Pen-

5
itentiary at Atlanta, Ga., together with a copy of this commitment.

J. M. MOORE,
U. S. Marshal, Eastern District of Kentucky

By WINTER NEAL,
Deputy.

EXHIBIT "C"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

THE UNITED STATES BOARD OF PAROLE

*To any Federal Officer Authorized to Serve Criminal
Process within the United States:*

WHEREAS, Frank Peel, No. 2379-Lee was sentenced by the United States District Court for the Eastern District of Kentucky to serve a sentence of two years, months, and days for the crime of violating the internal Revenue Act and was on the 18th day of April, 1935, released on parole from the Federal Reformatory Camp, Petersburg, Virginia.

AND, WHEREAS, satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the

said paroled prisoner is declared to be a fugitive from justice:

NOW THEREFORE, this is to command you to execute this warrant by taking the said Frank Peel, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this 21st day of November, 1935.

ARTHUR D. WOOD,

Chairman, U. S. Board of Parole.

Warrant having been issued as above you are hereby directed to commit said Frank Peel to U. S. Penitentiary, Atlanta, Georgia, which is hereby designated as the place of his further confinement.

By direction of the Attorney General

SANFORD BATES,

Director, Bureau of Prisons.

Filed June 5, 1937.

(TITLE OMITTED.)

AMENDMENT TO RETURN

Now comes respondent and with leave of the Court amends his return heretofore filed, and says that if the contentions set out in the application for *habeas corpus* be taken as true, and his two sentences of imprisonment

be construed as running concurrently, the *writ of habeas corpus* is not premature, and computed on this basis, petitioner's term of servitude would have expired June 1, 1937.

H. T. NICHOLS,
Assistant U. S. Attorney

ORDER

The foregoing amendment to return is hereby allowed. This 5th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed June 5, 1937.

**ORDER SUSTAINING WRIT OF HABEAS
CORPUS AND DISCHARGING PE-
TITIONER FROM CUSTODY**

The above case came on for a hearing, and was duly heard and considered.

This case involves the same questions as those in the case of *Kidwell v. Zerbst*, No. 1192 *Habeas Corpus*, decided by this Court on May 13, 1937, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and

order filed in the case of *Kidwell v. Zerbst*, and upon authority of same;

IT IS CONSIDERED, ORDERED and ADJUDGED that the *writ of habeas corpus* be and hereby is sustained, and that respondent discharge petitioner from custody at the expiration of three days from this date, which time is allowed for taking an appeal, if desired. Provided, however, respondent shall perfect an appeal sooner than the three day limit, then respondent is ordered and directed to release petitioner when he shall have made an appearance bond in said appeal.

This 5th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed June 5th, 1937.

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above-named respondent, Fred G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above-stated cause of the 5th day of June, 1937, wherein the *writ of habeas corpus* was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States

Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent.

Filed June 5, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. **IT IS FURTHER**

ORDERED that pending the determination of this appeal, appellee shall be released on bail in the sum of \$100.00 without sureties.

Dated this 5th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed June 5, 1937.

ASSIGNMENT OF ERRORS

And now on this 5th day of June, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 5th day of June, 1937, is erroneous:

(1). Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2.) Because the court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

(3.) Because the court erred in not ruling that the commission of a new federal crime by the parolee would

not absolve the parolee from penalty for violation of parole.

(4.) Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

(7). Because under the undisputed facts as set forth in the petition for *habeas corpus* and in the answer or return of the respondent, the court erred in sustaining the writ of *habeas corpus* and in ordering the petitioner discharged from custody.

WHEREFORE the respondent prays that the said judgment and order be reversed, and that the District

Court be directed to discharge said *writ of habeas corpus* and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney.

HARVEY H. TYSINGER,
Assistant U. S. Attorney.

H. T. NICHOLS,
Assistant U. S. Attorney.
Counsel for Respondent.

Filed June 5, 1937.

JUDGES CERTIFICATE AS TO EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the hearing of the above-entitled proceeding, the sole evidence consisted of the application for *habeas corpus* with exhibits attached and the return of the respondent with exhibits annexed, and said pleadings are settled as the evidence in the cause.

This 5th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed June 5, 1937.

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED
COURT:

You will please prepare transcript of record in this

cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for *habeas corpus* omitting exhibits attached thereto, and order allowing the same.
2. The return of the respondent and amendment thereto with exhibits attached thereto.
3. The judgment and order of court of June 5th, 1937.
4. Petition for appeal and order of court allowing same.
5. Judge's certificate as to the evidence.
6. The assignment of errors.
7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant U. S. Attorney,

H. T. NICHOLS,
Assistant U. S. Attorney.
Counsel for Respondent.

Filed June 5, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
) ss:
NORTHERN DISTRICT OF GEORGIA)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 19 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA, RE-
SPONDENT, *Appellant*,

versus

FRANK PEEL, PETITIONER, *Appellee*,

as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service hereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I here-
unto subscribe my name and affix the seal

of the said District Court, at Atlanta,
Georgia, this the 10th day of June, A. D.,
1937.

(SEAL)

J. D. STEWARD,
*Clerk, United States District Court,
Northern District of Georgia,*

By C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record,
the original thereof being on file in the office of the
Clerk of the United States Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6th, 1937

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY,
ATLANTA, GEORGIA

v.

FRANK PEEL

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the Court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern
District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in Federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting trans-

portation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f), in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwiatkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A., § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A., § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said

prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A., 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to

run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. *Escoe vs. Zerbst*, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concur-

rently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, thought not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their

old sentences while serving the new, contrary to the will and discretion of the Board, and that result it seems to me is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

FRANK PEEL

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 23 to 35 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8495, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Frank Peel is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 22 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December, A. D. 1937.

[SEAL]

OAKLEY F. DODD,

*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.